



**In The
Supreme Court of the United States**

October Term, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

vs.

**THE MONROE COUNTY BAR ASSOCIATION, THE
APPELLATE DIVISION OF THE SUPREME COURT,
FOURTH JUDICIAL DEPARTMENT, et. al.,**

Respondents.

**BRIEF FOR RESPONDENT MONROE COUNTY
BAR ASSOCIATION IN OPPOSITION**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	11
STATEMENT OF THE CASE	1
A. Petitioner was afforded ample opportunities to be heard in the disciplinary proceedings.....	3
B. Both the State and Federal Courts have found that Peti- tioner's pleas were not made with a protestation of inno- cence.....	8
C. The "Stay in Cananda".....	13
ARGUMENT.....	16
POINT I - THERE IS NO CONFLICT BETWEEN THE SECOND CIR- CUIT AND THE SIXTH CIR- CUIT ON THE ISSUE PRE- SENTED BY THIS RECORD.....	16
POINT II - THE DECISION OF THE COURT BELOW IS PLAINLY CORRECT.....	21
POINT III - THE CLAIMS THAT PETI- TIONER SEEKS TO PRESENT IN DISTRICT COURT ARE INSUBSTANTIAL.....	24
CONCLUSION.....	30

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Anderson v. Lecon Properties, Inc.</u> , 547 F.2d 929 (8th Cir.), cert. denied, 409 U.S. 879 (1972).....	20
<u>Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.</u> , 398 U.S. 281 (1971).....	23
<u>Blancher v. City of Chicago</u> , 504 F.2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948 (1975).....	20
<u>Brown v. Chastain</u> , 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970).....	20
<u>Coogan v. Cincinnati Bar Association</u> , 431 F.2d 1209 (6th Cir. 1970).....	18, 20 21
<u>Francisco Enterprises, Inc. v. Kirby</u> , 482 F.2d 481 (9th Cir. 1973), cert. denied, 416 U.S. 916 (1974).....	20
<u>Getty v. Reed</u> , 547 F.2d 971 (6th Cir. 1977).....	16, 17 18
<u>Ginger v. Circuit Court for the County of Wayne</u> , 372 F.2d 621 (6th Cir. 1967), cert. denied, 387 U.S. 935 (1967).....	18
<u>Hampton v. City of Chicago</u> , 484 F.2d 602 (7th Cir. 1973).....	21

	<u>Page</u>
<u>Kauffman v. Moss</u> , 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970).....	20
<u>Mack v. The Florida State Bd. of Den- tistry</u> , 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971).....	19
<u>Matter of Levy</u> , 37 N.Y.2d 279 (1975).....	3
<u>Mulligan v. Schlacter [Schlachter]</u> , 389 F.2d 231 (6th Cir. 1968).....	20
<u>Ney v. California</u> , 439 F.2d 1285 (9th Cir. 1971).....	20
<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	27
<u>Preiser v. Rodriguez</u> , 411 U.S. 475, 497 (1973).....	21, 22
<u>Rooker v. Fidelity Trust Co.</u> , 263 U.S. 413, 415-416 (1923).....	23
<u>Roy v. Jones</u> , 484 F.2d 96 (3rd Cir. 1973)..<	19
<u>Specht v. Patterson</u> , 386 U.S. 605 (1967)...	25
<u>Tang v. Appellate Division of the New York Supreme Court</u> , 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974).....	19
<u>Tempo Trucking and Transfer Corp. v. Dickson</u> , 405 F. Supp. 506 (E.D.N.Y. 1975).....	3, 28

Page

Turco v. Allen, 334 F. Supp. 209 (D. Md.
1971)..... 29

STATUTES

N.Y. CPLR 5601, 5602..... 7

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STATEMENT OF THE CASE

Petitioner, an attorney disbarred by an
order of the Appellate Division of the Supreme
Court of New York on January 28, 1975 (Matter

of Turco 46 A.D. 2d 490 (4th Dep't), appeal dismissed, 36 N.Y.2d 713, motion for leave to appeal denied, 36 N.Y. 2d 642, cert. denied., 423 U.S. 838, (1975)), seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit, which affirmed a judgment dismissing petitioner's amended complaint. In his amended complaint, petitioner sought to have the District Court review the disciplinary proceedings against him in the New York State courts on the grounds of alleged denials of due process of law. The Court of Appeals affirmed the dismissal of the actions on the grounds that res judicata bars the relitigation of issues presented to, and determined by, the New York State courts.

This Court denied Mr. Turco's prior petition for a writ of certiorari to the Court of Appeals of New York State (No. 74-1592; Turco v. Monroe County Bar Association of the State of New York, 423 U.S. 838 (1975)).

The facts pertinent to this petition are ably stated in the opinion of the Second Circuit (Gurfein, J.) reproduced at pages 4a-9a of Petitioner's Appendix. Petitioner's statement of the case has departed from fact in several important particulars, calling for the following corrections.

- A. Petitioner was afforded ample opportunities to be heard in the disciplinary proceedings.

Petitioner represents that he received no hearing in the Appellate Division before that Court determined (a) that the convictions in New York and Maryland were binding and could not be relitigated in the disciplinary proceedings, and (b) that these acts constituted professional misconduct for which discipline was warranted. That representation is, at best, misleading¹ and it requires a statement

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1. Petitioner objects to New York's rule that "an attorney convicted of a criminal offense may introduce evidence in mitigation and explanation [but] he may not relitigate the issue of his guilt of the offense for which he was convicted." Matter of Levy, 37 N.Y. 2d 279, 280 (1975). Compare, Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506, 517 N. 17, 18 (E.D.N.Y. 1975).

of the various hearings at which petitioner was able to, and in fact did, present his contentions.

In response to the written complaint served by the Bar Association,² petitioner filed a 61 page answer (with lengthy attachments). In his answer, petitioner denied none of the allegations in the written charges. He reviewed his personal history, his involvement with the defense of various Black Panther cases, his weapons arrest in New York City, his trip to Canada, his first trial in Maryland on the charges related to the death of Eugene Anderson, and his reasons for his pleas in New York City and Maryland. Petitioner concluded his answer with the request for a hearing in

2. On April 4, 1972 the Appellate Division ordered the Monroe County Bar Association to conduct an investigation on this matter.

which he might be permitted to prove his innocence of the charges to which he pled guilty.

By a motion before the Appellate Division, petitioner attacked the sufficiency of the complaint and pressed his contention that he was entitled to relitigate the facts established by the Maryland and New York convictions. At the hearing on this motion, petitioner's contentions were ably presented in writing and by oral argument of his retained counsel (Petition p. 35a).

After the Appellate Division determined that the written charges against petitioner were sufficient and "the acts of which [Mr. Turco] stands convicted constituted professional misconduct" (Petition pp. 35a-38a),

petitioner was granted a full hearing in mitigation³, which ultimately covered seven days of testimony. While Mr. Turco was not permitted to introduce evidence (apart from his own testimony) to establish his innocence of the charges of which he was convicted, he was given:

. . . full leeway and opportunity to explain his reasons for pleading guilty. [Mr. Turco's] testimony and supporting evidence . . . was detailed and quite complete. (Petition p. 44a; 46 A.D. 2d at 493)

3. Petitioner complains that the mitigation hearing was after the Appellate Division's determination that some disciplinary action was warranted. It should be noted that this determination was made with full recognition of the circumstances set forth at length in petitioner's answer and after petitioner had the opportunity for oral argument and written briefs.
4. The same explanation of the circumstances of the pleas, set forth by petitioner to establish the "bona fides of [his] demand for a hearing..." (Petition pp. 12-15) was exhaustively presented to the Appellate Division.

After the mitigation hearing, Mr. Turco had the opportunity to review and respond to the written report prepared by the hearing justice. He submitted a further extensive brief. His attorney was granted a further hearing to present oral arguments before the Appellate Division.

Following the Appellate Division's order of disbarment, petitioner served a notice of appeal to the New York Court of Appeals and also moved for leave to appeal.⁵ Consistent with the practice of the New York Court of Appeals, there was no oral argument on this motion; petitioner submitted a 51 page affidavit in support of his right to appeal, fully

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5. See N.Y. CPLR 5601, 5602. An appeal may be taken as of right from a final order "where there is directly involved the construction of the constitution of the state or of the United States . . . "

presenting to that Court the same issues that he thereafter presented in the District Court. The Court of Appeals denied Mr. Turco's motion for leave to appeal (36 N.Y. 2d 642) and dismissed his appeal taken as of right "upon the ground that no substantial constitutional question is directly involved" (36 N.Y. 2d 490).

Accordingly, while petitioner asserts that he was denied a due process hearing, the record clearly establishes the contrary.

B. Both the State and Federal Courts have found that Petitioner's pleas were not made with a protestation of innocence.

Petitioner represents to this Court that his pleas in New York and Maryland were made with the vigorous claim that he was innocent of all charges. He fails even to acknowledge that each court that has considered the issue has concluded that this representation is contrary to the record. (46 A.D. 2d at

492; Petition, p. 11a) If petitioner has a good faith basis for continuing to advance this apparently false claim, he has failed to set it forth.

In the Maryland plea proceedings, the prosecutor stated the substance of the testimony that would be offered by the prosecution if the case proceeded to trial. In mitigation of the sentence, counsel for petitioner stated the nature of the evidence that the defense would present, including an alibi defense. The prosecutor objected to defense counsel's declaration that petitioner contends that "he was totally innocent of all charges." The assertion of innocence was stricken from the record after a conference at the bench as follows:

THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was

being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina vs. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.

MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.

* * *

THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

MRS. O'CONNOR: Correct. We would ask the entire portion starting "If Mr. Turco were called to the stand..." be deleted at this point and the plea continue with the completion of the last witnesses, Mr. Clerk.

MR. KUNSTLER: I would agree to that.

As stated by the Second Circuit (Petition p. 11a), "a disavowal of reliance on Alford, though not in such unequivocal terms, was made in New York plea proceedings as well."

Even if the record of the New York plea proceedings sustained petitioner's claim that he there asserted an "Alford plea" (and we are inclined to accept that claim), petitioner's direct testimony in the mitigation hearings rebuts his claim that he believed himself to be innocent of all charges against him in New York City.⁶ That testimony shows that petitioner

6. Petitioner has sometimes qualified his claim by stating that he was "innocent of the specific charges to which he pleaded guilty." (Petition, pp. 11-12; emphasis added.) With that qualification, his claim allows for the possibility that he was guilty of other charges involved in the plea bargaining.

recognized that he might be guilty of at least one charge:

Q. [Petitioner's counsel] ...
Tell us about the disposition of the case in New York City...

* * *

A. . . . The district attorney stated very clearly that there was no evidence that I lived there; in fact, there was evidence to the contrary that I did not live there. I was just staying there for a while. However, they did add a charge against me for bail jumping when I was in Canada in Montreal. The New York case was continuing and I did not appear. Other persons, I understand, had been there had warrants against them, the cases were finally dismissed against everybody except me, and so I went back to New York in March. The district attorney informed me that they had added another charge to me of bail jumping.

So I was in New York and I spoke with Gerald Lefcort about what we should do. There was no doubt in my mind that we could prove my innocence of the gun charges. There was no doubt in my mind. The only question was whether or not, what we could say about bail jumping was that defensible position because I was in Canada when I was supposed to appear in New

York, and we had thought it would be advisable to avoid that issue since that issue might tend to include a moral turpitude issue, and it was resolved again with the district attorney that I took a plea under the Alford case, where I maintained my innocence and which was put in the record.

Q. Was the bail jumping charge dismissed?

A. Yes, the bail jumping charge and all the rest of the charges were dismissed.

Q. What was the disposition of the case in New York City?

A. I took a plea to a misdemeanor, possession of weapons, and I received a conditional discharge of three years.

(Emphasis Added)

C. The "Stay in Canada".

Petitioner makes no mention of a further subject that he voluntarily introduced in his answer and his direct testimony in the

mitigation hearings.⁷ In February 1970, petitioner was arrested in New York City and charged with possession of weapons, dangerous drugs, and hypodermic instruments. He was released on bail. He went to Montreal to give a speech, apparently without notifying the New York authorities. Before the speech, petitioner learned that he had been indicted in Baltimore in connection with the murder of Eugene Anderson. Petitioner learned through an attorney that he would not be granted bail if he returned to Baltimore. Petitioner's planned speech was thereupon cancelled, and he remained in Canada for seven months using the assumed name of Leon Wright, in an effort to avoid

7. Petitioner has asserted that, during the mitigation hearing, "nor was there any evidence concerning anything negative about petitioner's character." (Petition, p. 12) We assume that petitioner has inadvertently neglected the facts of his activities in Canada.

arrest and extradition. He was, however, arrested and identified when questioned by Canadian authorities in connection with a general investigation of a kidnapping. After extradition proceedings were begun, petitioner waived extradition and returned to Baltimore with a police escort. (See, 46 A.D.2d at 496-497, 501; Petition, p. 6a)

Although "bail jumping" and the "stay in Canada" were not the basis of the Bar Association's charges against petitioner, these facts were voluntarily introduced by petitioner. These matters were addressed in his answer, his testimony, and the briefs -- with no claim that these matters were not a proper subject for consideration by the court.

ARGUMENT

POINT I

THERE IS NO CONFLICT
BETWEEN THE SECOND CIRCUIT
AND THE SIXTH CIRCUIT ON
THE ISSUE PRESENTED BY THIS
RECORD.

The Second Circuit properly observed that this record does not present the issue on which the Supreme Court has yet to render a definitive ruling: i.e., "where the state litigation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not." (Petition p. 13a.) As stated by the Second Circuit (Petition, p. 12a), "[Petitioner] does not question that he has raised the same claims in the State courts."

It is only by ignoring the posture in which the issue was raised, as well as the reasoning and holding of the case, that petitioner can claim that Getty v. Reed, 547 F.2d

971 (6th Cir., 1977), is in conflict with the determination by the Second Circuit in the instant case. Getty v. Reed involved an attack on the three-tiered procedure for disbarment of Kentucky lawyers in which the Kentucky Court of Appeals decides guilt and penalty after hearing oral argument on a record developed before a trial panel. The Sixth Circuit held that the District Court had jurisdiction of the complaints because the plaintiffs raised an attack on the constitutionality of the State procedural statutes and regulations and sought the convening of a three-judge court. However, except with respect to a First Amendment claim that one lawyer's right of freedom of speech was curtailed by disciplinary action based on his statements during a state court trial, the Sixth Circuit affirmed the dismissal on the grounds that the due process claims were not substantial.

The Sixth Circuit in Getty v. Reed expressly noted that its decision was "[w]ithout reference at this point to... such defenses as res judicata and collateral estoppel" (547 F.2d at 974) because such defenses "could only properly be pled and considered before the three-judge court itself" (547 F.2d at 975). The Court in Getty v. Reed expressed its continued adherence to Ginger v. Circuit Court for the County of Wayne, 372 F.2d 621 (6th Cir., 1967), cert. denied, 387 U.S. 935 (1967) and Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir., 1970), both of which bar the relitigation of issues raised and decided in state court disciplinary proceedings. (See 547 F. 2d at p. 974.) To the extent that the court in Getty v. Reed expressed any view that the District Court might have "jurisdiction" to consider claims arising from disciplinary proceedings (547 F.

2d at p. 974) or expressed agreement with Judge Oakes' dissenting opinion in Tang v. Appellate Division of the New York Supreme Court, 487 F. 2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), these statements are dicta. Those views are consistent, as well, with the Court's observation that the defense of res judicata was premature in the posture of Getty v. Reed.

Nor is there any substantial conflict on this point among the several circuits. Mack v. The Florida State Bd of Dentistry 430 F.2d 862 (5th Cir., 1970), cert. denied, 401 U.S. 960 (1971, White, J. dissenting from denial of writ), appears to be the only instance in which a federal court, overruling the defense of res judicata, permitted the relitigation in a Section 1983 action of issues actually determined in state court. The Circuit Courts have otherwise uniformly applied res judicata to Section 1983 actions. E.g., Roy v. Jones, 484

F.2d 96 (3rd Cir. 1973); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Blankner v. City of Chicago, 474 F. 2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Anderson v. Lecon Properties, Inc. 457 F.2d 929 (8th Cir.) cert. denied, 409 U.S. 879 (1972); Francisco Enterprises, Inc. v. Kirby 482 F.2d 481 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974). Where res judicata has not been applied, it is because the record did not show that the question sought to be raised in federal court was put in issue and determined in the state court proceedings. E.g. Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970); Mulligan v. Schlacter [Schlachter], 389 F.2d 231 (6th Cir., 1968); Ney v. California, 439 F.2d 1285 (9th Cir., 1971). In one further case advanced as

illustrating the "inconsistencies" (Petition, p. 39), the court held that res judicata did not apply where the plaintiffs in the federal court action were not parties to the judgment in state court. Hampton v. City of Chicago, 484 F.2d 602, 606 n.4 (7th Cir., 1973).

This court's view of the subject has been indicated with sufficient clarity in Preiser v. Rodriguez, 411 U.S. 475, 497 (1973), citing (among others) Coogan v. Cincinnati Bar Association, supra. There is therefore no overriding reason for any further pronouncement on this issue at the present time.

POINT II

THE DECISION OF THE COURT BELOW IS PLAINLY CORRECT

In contending that the principles of res judicata are inappropriate in Section 1983 cases, petitioner relies on examples drawn from criminal law. Petitioner apparently ignores

the fact that a specific statute authorizes the lower federal courts to entertain applications for a writ of habeas corpus. He then advances his view of public policy and suggests that the writ of certiorari is an insufficient guaranty that state courts will adhere to the dictates of due process of law.

These flimsy contentions are lacking in substance. Petitioner's analogies are inappropriate because the writ of habeas corpus arises from a specific grant of authority to the federal courts to review the constitutional validity of custodial confinement. Preiser v. Rodriguez, 411 U.S. 475, 495 (1973). Petitioner has not even attempted to demonstrate that Section 1983, by its language or its central purpose, confers upon the lower federal courts the power to exercise appellate review over civil proceedings in the state court. He fails to mention the consistent holdings of

this Court that the District Courts do not have jurisdiction to review state court proceedings for possible constitutional error. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923); Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1971).

If Petitioner's argument were to be accepted (in spite of its lack of substance), then the Federal District Courts would have jurisdiction under Section 1983 to exercise review over every state civil proceeding in which due process contentions (or other constitutional arguments) were raised. This result would be not only contrary to the results in Rooker and Atlantic Coast Line Railroad; it would be contrary to fundamental notions of our federal system. Plainly, it would take something more than the petitioner's view of public policy to warrant such a drastic change

in the long standing relationships between the state and federal judicial systems.

POINT III

THE CLAIMS THAT PETITIONER
SEEKS TO PRESENT IN
DISTRICT COURT ARE INSUB-
STANTIAL.

Even if there were sufficient reason to consider the res judicata issue as it applies to Section 1983 cases, this record provides a particularly unlikely vehicle for that consideration. The record is replete with issues of state substantive law, independently justifying the discipline imposed. Moreover, the issues that petitioner seeks to raise in District Court lack substance.

Petitioner finds solace in the Second Circuit's statements that his claims may not be "entirely frivolous" (Petition pp. 26, 36; emphasis supplied). That comment, however, must be considered in context with the Second Circuit's further statement (Petition, p. 11a):

To the extent that the contentions lack constitutional significance, they are not cognizable in the federal courts. To the extent that they possess such significance, they have already been determined adversely to [Turco] on the merits."

The New York Court of Appeals summarily rejected petitioner's due process claims on the merits by dismissing his appeal "upon the ground that no substantial question is directly involved." (36 N.Y. 2d 713)

On the question of the substantiality of petitioner's contentions, the determination by the New York Court of Appeals falls closer to the mark. Petitioner has identified three contentions, the first of which is allegedly based on Specht v. Patterson, 386 U.S. 605 (1967). The principles of Specht provide no assistance to petitioner. He was made expressly aware at the time of both of his guilty pleas that the convictions might have collateral consequences affecting his standing

as an attorney. The prosecuting attorney in the Maryland proceedings stated that one of the considerations for accepting petitioner's plea to a reduced charge was "...that by pleading guilty to assault [Mr. Turco] is exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment procedures in New York." See, 46 A.D. 2d at pp. 498-499. Similarly, in the New York proceedings, the prosecutor made the following statement in recommending sentence:

Mr. Corriero: Your honor, I believe, is aware that defendant is an attorney and an officer of the Court and admitted to practice in the State of New York. I believe, under the circumstances, that the charges against the defendant are extremely serious, and that the Court should consider this in imposing sentence on this defendant.

In the disciplinary proceedings before the Appellate Division, petitioner was given ample opportunity to be heard on whether these

convictions evidenced professional misconduct. Even assuming that Specht requires a due process hearing before disciplinary sanctions could flow from petitioner's criminal convictions, petitioner was afforded every opportunity to be heard that due process might contemplate.

Petitioner's argument based on North Carolina v. Alford also lacks any degree of substance. His position is without basis in fact because, as earlier demonstrated, he was not permitted to make an Alford plea in Baltimore. Whether he asserted his innocence in the New York proceedings is not material because he thereafter admitted that he lacked a defense to the "bail jumping" charge and found it "advisable to avoid that issue..." There is, moreover nothing in Alford that protects a defendant who pleads guilty in the face of strong evidence of guilt from the imposition of

collateral consequences which were actually known to the defendant at the time of his criminal conviction. Petitioner's claim based on Alford is utterly fallacious both factually on this record and as a matter of law. E.g., Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506 (E.D.N.Y. 1975).

There is no merit in petitioner's final contention: that the Appellate Division accepted as dispositive the offers of proof in Baltimore and New York when petitioner entered his pleas to the reduced charges. Petitioner claimed that his pleas were motivated by ill health, lack of funds and hostile judicial attitudes. It thereby became necessary for the Appellate Division to consider the totality of the circumstances of the pleas as such circumstances were actually stated on the record when the pleas were made. These circumstances naturally included the nature of the underlying

charges, the factual foundations offered by the prosecutors, the prosecutors' reasons for recommending the acceptance of a plea to a reduced charge and the position there stated by and on behalf of Petitioner. In reciting the circumstances of the underlying charges, the Appellant Division relied on the summary of the testimony of the prosecution's witnesses, to which petitioner had stipulated. (Petition, p. 8a) This review was made necessary by petitioner's claims regarding the motivation of his pleas, because it thereby became clear that one further reason for the pleas was the strong factual support for the cases against him.⁸

8. Indeed, when a mistrial was declared in petitioner's first trial in Maryland, the jury was split 9-3 in favor of conviction. Turco v. Allen, 334 F. Supp. 209, 210 (D. Md. 1971).

That the Appellate Division reviewed the factual foundation stated by the prosecutors at the times of the pleas does not, of course, warrant petitioner's conclusion that the Appellate Division found him guilty of charges to which he had not pled guilty.

CONCLUSION

For the reasons stated, the petition should be denied.

Dated: July 15, 1977

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